IN THE

Supreme Court of the United States

OCTOBER TERM 1941.

No. 233

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Petitioner below,

against

JAMES R. WASHER, Executor, Estate of Benjamin Seelig Washer,

Petitioner and Respondent below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, The Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

The Commissioner of Internal Revenue determined a deficiency in estate tax liability and gave petitioner the statutory notice thereof (§501, Revenue Act of 1934) on or about December 9, 1937 (R. 9-13).* Upon petition to

* References in parentheses are to pages of the Record, unless otherwise indicated.

the Board of Tax Appeals (R. 4-13), the Board, on February 12, 1940, reversed the determination of the Commissioner and ordered and decided that there was no deficiency (R. 15-16).

An appeal from said decision was taken by the Commissioner on May 3, 1940 (R. 16-23) to the Circuit Court of Appeals for the Sixth Circuit, which, on April 16, 1942, reversed the decision of the Board of Tax Appeals and remanded the cause to the Board for further proceedings consistent with the Court's opinion (R. 58).

The question involved on said appeal was whether the Board of Tax Appeals correctly decided that the proceeds of life insurance policies on the life of Benjamin Seelig Washer, hereinafter referred to as "decedent", payable to beneficiaries other than decedent's executor, should be excluded from decedent's gross estate for Federal estate tax purposes.

The facts are stipulated (R. 25-52). The decedent, a resident of Kentucky, died February 5, 1935 (R. 25), at the age of fifty-three (R. 29). At his death there were outstanding fourteen policies of insurance upon his life issued by Northwestern Mutual Life Insurance Company and four issued by John Hancock Mutual Life Insurance Company, in each of which his wife, Amy D. Washer, was named as beneficiary. The aggregate proceeds of the eighteen policies above mentioned were $189,995.67 (R. 28). Six of the Northwestern policies, totaling $30,000 face value, were issued prior to the effective date of the Revenue Act of 1918 (R. 32). As originally written, the policies reserved to the insured the right to change the beneficiary and mode of payment, and also the right to borrow upon the policies and/or to surrender the same for their cash value (R. 35, 45).

On December 19, 1932, the decedent caused endorsements to be affixed to the Northwestern policies wherein he waived the power to exercise the rights and privileges conferred upon him by the terms of the policies without the written

consent of his wife, the beneficiary. The endorsement further provided that in the event of the death of the beneficiary before the proceeds became payable, the power to exercise such rights and privileges should vest solely in the decedent (R. 36). On January 18, 1933, he likewise by endorsement to the Hancock policies waived the right to change the beneficiary, the method of payment or the right to borrow upon or surrender the policies without the written assent of his wife (R. 46); and by endorsement dated December 17, 1934, the right to change the contingent beneficiaries was made dependent upon the written consent of the beneficiary (R. 49).

At his death there survived the decedent his widow, his two sons, aged twenty-nine and twenty-five, respectively, and his grandson, aged three. Another grandchild was born shortly thereafter (R. 29).

The proceeds of all of the policies were to be held by the respective insurers and interest paid to the beneficiary during her life, then to the two sons during their lives, and, upon the death of either son, his share to be paid to his surviving child or children, and if none, to be added to the other son's share, if living, otherwise to the child or children of such other son. In the event both sons should predecease their mother leaving no child or children surviving, she had the right, in accordance with certain options, to receive the principal in installments, and if she dies before receiving the entire principal, then any proceeds remaining unpaid in the companies' hands are to be paid to the decedent's representatives (R. 39, 49-50, 29).

Thus the decedent irrevocably divested himself of all incidents of ownership over the policies, retaining only (a) the contingent power to exercise the rights and privileges conferred by the policy in the event the beneficiary should predecease the decedent, and (b) the extremely remote right of his estate to receive any unpaid proceeds of the policies upon the death of the beneficiary, but only in the event she survived all the contingent beneficiaries and had not herself received the entire proceeds of the policies.

II

Reasons Relied on for Allowance of the Writ

1. The decision of the Circuit Court of Appeals is contrary to the decisions of this Court in *Bingham* v. *United States,* 296 U. S. 211, 80 L. ed. 160, and *Industrial Trust Co.* v. *United States,* 296 U. S. 220, 80 L. ed. 191.

2. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walker* v. *United States,* 83 F. (2d) 103, and apparently in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Kellogg,* 119 F. (2d) 54, the decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Betts,* 123 F. (2d) 534, the decision of the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Dunning,* 118 F. (2d) 341, and the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Kaplan,* 102 F. (2d) 329.

3. The decision of the Circuit Court of Appeals is apparently in conflict with the decisions of this Court in *Helvering* v. *Wood,* 309 U. S. 344, 84 L. ed. 796; *Helvering* v. *Tex-Penn Oil Co.* 300 U. S. 481, 81 L. ed. 755; *Helvering* v. *Salvage,* 297 U. S. 106, 80 L. ed. 512; and *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 80 L. ed. 154; in so far as respondent, Commissioner of Internal Revenue, has been permitted to claim that decedent retained incidents of ownership in each of the policies within the contemplation of Section 302(g) of the Revenue Act of 1926 (see *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 73 L. ed. 404), whereas in his notice of deficiency addressed to petitioner the respondent expressly acknowledged that decedent possessed no incidents of ownership whatever in said policies and relied entirely upon the claimed application of Section 302(d).

4. The decision of the Circuit Court of Appeals is apparently in conflict with the decisions of this Court in *Helvering* v. *Hallock,* 309 U. S. 106, 84 L. ed. 604; and *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 73 L. ed. 410, and with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* 127 F. (2d) 942, and with the Court of Claims in *Central National Bank of Cleveland* v. *United States,* 41 F. Supp. 239, 247-8, for the reason that the Court held that not merely the value of the interest retained but the entire proceeds of the policies were taxable, notwithstanding the fact that the contingency upon which the decedent or his estate might possibly have received some portion of the proceeds was concededly "extremely remote".*

5. The decision of the Circuit Court of Appeals goes far beyond the Treasury Regulations in effect on February 5, 1935, the date of the decedent's death (see Article 25 of Regulation 80, 1934 Edition).

6. The decision of the Circuit Court of Appeals in taxing the proceeds of insurance policies where the possibility retained by the decedent was concededly "extremely remote" presents a serious departure from long-established interpretation of the statute, and affects countless insurance policies now in force or which have recently matured. In the light of such circumstances the uncertainty created by the decisions of the various circuit courts of appeals, particularly in their construction of the decision in *Helvering* v. *Hallock, supra,* should be removed and the law settled.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and

* See opinion of the Court of Appeals, 127 F (2d) 446, 449; (R. 62).

complete transcript of the record and proceedings of the said Circuit Court of Appeals had in case numbered and entitled on its docket 8834, Commissioner of Internal Revenue, Petitioner, against James R. Washer, Executor, Estate of Benjamin Seelig Washer, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the decree herein of such Circuit Court of Appeals be reversed by the Court, and for such other and further relief as to this Court may seem proper.

Dated: July 14, 1942.

EUGENE L. GAREY,
Counsel for Petitioner.